

HEIRS OF DOREEN ITTA
BERNICE AHTUANGARUAK
MOLLIE ITTA
WILBER AHTUANGARUAK

IBLA 85-178, 85-179,
85-180, 85-230

Decided May 13, 1987

Consolidated appeals from decisions of the Fairbanks, Alaska, District Office, Bureau of Land Management, rejecting Native allotment applications F-14612, F-15488, F-14615, and F-11941.

Motion to dismiss denied; decisions affirmed as modified.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Constitutional Law: Due Process -- Conveyances: Generally -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants -- Alaska National Interest Lands Conservation Act: Native Allotments-Conveyances: Generally -- Hearings -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the

applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants -- Alaska National Interest Lands Conservation Act: Native Allotments-Conveyances: Generally -- Hearings -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

4. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants -- Alaska National Interest Lands Conservation Act: Native Allotments-Conveyances: Generally -- Hearings -- Patents of Public Lands: Effect -- Public Lands: Jurisdiction Over

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellants;
Bruce E. Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management;
Michael G. Hotchkin, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

These are consolidated appeals from October 29, 1984, decisions of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), rejecting

the Native allotment application of Doreen Itta (F-14612, IBLA 85-178), 1/ Bernice Ahtuanguaruak (F-15488, IBLA 85-179), Mollie Itta (F-14615, IBLA 85-180), and a November 21, 1984, decision partially rejecting the application of Wilber Ahtuanguaruak (F-11941, IBLA 85-230). All of these applications described land within the exterior boundaries of the 1923 withdrawal for Naval Petroleum Reserve No. 4, now called the National Petroleum Reserve-Alaska (NPR-A). BLM had closed the case file of Mollie Itta's application after she withdrew it in 1973. BLM rejected the applications of the remaining appellants because they applied for land within the petroleum reserve. Wilbur Ahtuanguaruak did not appeal the rejection of his application. 2/ This Board affirmed the rejection of Doreen Itta's application in Silas Negovanna, 15 IBLA 408 (1974). 3/ The rejection of Bernice Ahtuanguaruak's application was affirmed in Georgianna A. Fisher, 15 IBLA 79 (1979).

BLM reinstated these applications in 1981. This action was prompted by the enactment on December 2, 1980, of section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1982), which provides as follows:

Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve-Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection * * *.

On the basis of this provision, BLM partially approved the allotment application of Wilber Ahtuanguaruak, but rejected it with respect to 20 acres previously conveyed to the Ukpeagvik Inupiat Corporation for the Village of Barrow (IC 045) on November 19, 1976. Because all of the land described in

1/ Doreen Itta died in July, 1972. This appeal is brought on behalf of her heirs.

2/ By decision dated May 13, 1969, the Fairbanks District Office rejected Wilber Ahtuanguaruak's application because the land was entirely within Naval Petroleum Reserve No. 4. No appeal from this decision was filed. The fact that the case was closed prior to 1971, however, did not prevent those portions still on Federal lands from being affected by ANILCA. See Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985). Accordingly, BLM reinstated appellant's application in 1981, and by decision dated Nov. 21, 1984, granted appellant's application for all but 20 acres of land that had been conveyed to Ukpeagvik Inupiat Corporation under IC 045.

3/ Mollie Itta, the mother of Doreen Itta, attempted to withdraw her application by a document dated Nov. 29, 1973. This relinquishment was not considered effective.

the applications of the other appellants had been conveyed to Ukpeagvik Inupiat, BLM rejected these applications in full.

In the decisions that are the subjects of these appeals, BLM concluded that land described by the allotment applications, which had been conveyed to Ukpeagvik Inupiat, was not part of the NPR-A at the time of ANILCA's passage. However, because the land was within the NPR-A on December 13, 1968, it was not unreserved on that date. BLM reasoned that the Native allotment applications were not legislatively approved and must be adjudicated pursuant to the requirements of the 1906 Act. Again, BLM rejected the applications because qualifying use or occupancy by the applicants had not been initiated prior to the 1923 withdrawal. See William Bouwens, 46 IBLA 366 (1980).

Appellants contend the fact that the lands described in the applications were not part of the NPR-A on December 2, 1980, does not bar approval of their applications. They contend Congress intended that lands within the exterior boundaries of the NPR-A were to be considered "vacant, unappropriated and unreserved" for the purpose of adjudicating Native allotment claims. Appellants contend their applications were legislatively approved unless otherwise excepted by the provisions of subsections 905(a)(3) through (6).

BLM's decision and appellant's statement of reasons share a common error in the analysis of the effect of the conveyance of the lands to Ukpeagvik Inupiat. By mischaracterizing the issue as whether the conveyance removed the land at issue from the NPR-A, the decision and the statement of reasons have overlooked a more important question: whether Congress intended, by enacting ANILCA, to approve allotments on land which had been conveyed out of Federal ownership. In its answer to appellants' statement of reasons, BLM corrected its characterization of this issue and now asserts that the Department has no jurisdiction over the lands conveyed to Ukpeagvik Inupiat. BLM has moved for dismissal of the appeals on this basis.

Although BLM is correct in contending that the Department has no jurisdiction over the land, it does not automatically follow the appeals must be dismissed. Even though the land may have been conveyed, the Department would be obligated to determine whether the conveyance was erroneous, and if so, whether action should be undertaken to cancel the conveyance. See Matilda Titus, 92 IBLA 340 (1986). Moreover, BLM has reinstated appellants' applications and issued the decisions appealed herein. Thus, dismissal of these appeals would not be the proper remedy from the agency's point of view; instead, we will consider BLM's motion as suggesting an alternative ground for affirming the decision below.

In response, appellants contend that BLM's jurisdictional argument obfuscates what they characterize as the "primary issue on appeal here: whether the lands within the National Petroleum Reserve are considered 'vacant, unappropriated and unreserved' within the meaning of the 1906 Alaska Native Allotment Act." Appellants contend that BLM retains its duty "to make a preliminary determination as to the validity of the Native allotment applications * * *" quoting Alaska v. Thorson, 83 IBLA 237, 254 (1983), and citing

Aguilar v. United States, 474 F. Supp. 840, 847 (D. Alaska 1979); Peter Andrews, Sr., 77 IBLA 316, 319 (1983). Appellants urge us to hold that lands within the NPR-A are "vacant, unappropriated and unreserved" within the meaning of the 1906 Native Allotment Act, and remand these cases to BLM for further action.

[1] The action appellants urge us to take cannot be predicated on ANILCA, however. We have previously rejected the argument that section 905 of ANILCA, 43 U.S.C. § 1634 (1982), constitutes a legislative approval of allotments on lands previously conveyed out of Federal ownership. Matilda Titus, supra. As Administrative Judge Grant noted in his concurring opinion:

Legislation passed by Congress concerning disposition of the public lands cannot generally dispose of lands previously conveyed into private ownership and, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

92 IBLA at 351. In Titus, for example, the Board remanded the case for further action because a factual issue had been raised concerning the validity of the relinquishment of Titus' application, which in turn would affect the validity of any conveyance which did not exclude the land subject to the Titus application. Because ANILCA did not confirm Native allotment applications for land previously conveyed out of Federal ownership, that statute has no relevance to the disposition of the instant appeals.

[2] Thus, if the Department conveyed land prior to final adjudication of a pending Native allotment application, the government would no longer have jurisdiction over the land. Nevertheless, a hearing would be required to decide disputed issues of fact to permit a determination whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant the initiation of action to recover the land for the benefit of the applicant. See Aguillar v. United States, 974 F. Supp. 840 (D. Alaska 1979). A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right. See Agnes Mayo Moore, 91 IBLA 343 (1986).

[3, 4] These appeals differ from Aguillar in two critical aspects. First, none of the subject applications were pending on the date of conveyance of the affected lands from Federal ownership. Decisions rejecting three of the applications had become final; the other applications had been relinquished, and there is no contention that this relinquishment was neither knowing nor voluntary. ^{4/} Cf. Matilda Titus, supra, (holding that an unknowing or involuntary relinquishment would be void). Second, these appeals present

^{4/} On June 10, 1971, Mollie Itta filed Native allotment application, F-14615, claiming seasonal subsistence use for hunting and fishing from the summer of 1921 until the present. On Dec. 4, 1973, she filed a relinquishment of her

no genuine issues of material fact concerning the validity of the applications to be resolved at a hearing. Three of the allotment applications indicate that the applicants did not claim use and occupancy until after the withdrawal of the land in 1923. As a matter of law, these applicants had no valid existing rights on the date of conveyance. Agnes Mayo Moore, *supra*. Although Mollie Itta, the applicant who relinquished her application, claimed use and occupancy prior to the 1923 withdrawal, she was only 14 months old at the time and, therefore, was too young as a matter of law, to have initiated qualifying use and occupancy for an allotment. See Floyd L. Anderson, 41 IBLA 280, 86 I.D. 345 (1979). Thus, none of the appellants had valid existing rights to allotments on the date of the interim conveyance.

We conclude, therefore, that appellants have presented no valid basis, legal or factual, to question the validity of the conveyance of the land to Ukpeagvik Inupiat Corporation in 1976. The constitutional concerns to which Judge Grant refers in his concurring opinion in the Titus case preclude us from construing ANILCA in a manner which would render unlawful a previously valid conveyance.

Moreover, another consideration works against taking further action on these applications. When Ukpeagvik Inupiat received its conveyance of this land pursuant to 43 U.S.C. § 1613(a) (1982), it became obligated under 43 U.S.C. § 1613(c)(1) (1982) to "convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as a headquarters for reindeer husbandry." (Emphasis added.) 5/

fn. 4 (continued)

application in the form of a typewritten letter headed with the name and address of Arctic Slope Regional Corporation, addressed to Thomas Dean, at the Fairbanks BLM Office. The typewritten letter provides as follows:

"I had previously filed for a Native Allotment, serial number F-14615, F-14612 located at T 20 N R 20 W Sec. 20. After consulting with the directors of Ukpeagvik Inupiat Corporation. I find it to be my own interest to withdraw my application for the Native Allotment.

"Please consider my Native Allotment to be formally withdrawn as of November 29, 1973."

We note that the signature appears to be written in the same hand as the application, although smaller. It also appears that appellant spelled her first name Mollie, and then changed the "ie" to a "y", perhaps to correspond to the typewritten spelling beneath her signature. BLM closed this case on Dec. 5, 1973.

5/ As originally enacted, this provision did not expressly state that the right to reconveyance vested on December 18, 1971, the date of enactment, although one could fairly infer that such was the legislature's intent. Any doubt was eliminated upon enactment of ANILCA in 1980, when Congress amended the provision by inserting the following clause after the word "occupied": "as of December 18, 1971 (except that occupancy of tracts located in the Pribiloff Islands shall be determined as of the date of initial conveyance

Were BLM to consider further these Native allotment applications, the sole purpose would be for the initiation of a suit to cancel the conveyance to Ukpeagvik Inupiat so that BLM could reconvey the land to appellants. But appellants have made no effort to enforce the provision in Ukpeagvik Inupiat's conveyance which requires Ukpeagvik Inupiat to reconvey the land, even though they may have a right to "such" a reconveyance. There is no reason for BLM to seek cancellation of this conveyance if enforcement of the provisions of the grant to the corporation could result in a conveyance from Ukpeagvik Inupiat to appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge.

fn. 5 (continued)

of such tracts to the appropriate Village Corporation)."

P.L. 96-487, § 1404(a), 92 Stat. 2493, (Dec. 2, 1980); 43 U.S.C. § 1613(c)(1) (1982). Except for the provision respecting the Pribiloff Islands, we construe the amendment as a clarification of an ambiguity rather than as a change in existing law. See S. Rep. No. 413, 96th Cong., 2d Sess. 311 (1979), reprinted in 1980 U.S. Code Cong. & Admin. News 5255.

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

While in general agreement with the result reached in the majority decision, I wish to more specifically address the argument which appellants make on appeal relating to the effect of section 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), on the status of lands withdrawn for NPR-A (formerly, Naval Petroleum Reserve No. 4).

Initially, I wish to record my agreement with the majority conclusion that Congress could not legislatively approve allotments where the land sought had passed from Federal ownership prior to the adoption of ANILCA. See Matilda Titus, 92 IBLA 340 (1986). In the instant case, the land involved was conveyed to the Ukpeagvik Inupiat Corporation on November 19, 1976. Thus, to the extent that appellants' allotment claims embraced land which had been conveyed to the Native corporation, the allotment of that land could not be deemed to be legislatively approved by ANILCA.

The majority recognizes, of course, that this does not end the matter. Thus, as the District Court held in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), where a Native allotment applicant alleges that the United States has erroneously patented land to another in derogation of the Native's rights, the Department must make a preliminary determination whether or not the patent improperly issued before it may reject the Native allotment application. If such an investigation discloses that issuance of the patent was improper, the Department must then take steps to reacquire title to the land so that it may be vested with jurisdiction to adjudicate the competing claims thereto. In its investigation, however, the Department must determine whether the native allotment application has established his or her right to an allotment under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), since the legislative approval effectuated by section 905(a)(1) of ANILCA does not apply to such applications. See Matilda Titus, *supra*.

The initial issue to be resolved is whether, in an adjudication of a Native allotment under the 1906 Act, Exec. Order No. 3797-A of February 23, 1923, which established Naval Petroleum Reserve No. 4, operates as an absolute bar to claims initiated after that date. Appellants argue, primarily based on the legislative history of the relevant language in section 905(a)(1), that Congress intended to remove that withdrawal as a bar to approval of an allotment application even in those cases where the allotment was not legislatively approved. Thus, it relies on the following discussion of this provision by Representative Udall of Arizona, Chairman of the House Committee on Interior and Insular Affairs, after President Carter had signed the legislation on December 2, 1980. Great reliance is placed on the following language:

The amendment removes an impediment to consideration of an allotment application describing land within the NPR-A presented by any land status which was or may have been created, if at all, by any executive withdrawal order including, but not limited to, Executive Order 3797-A, Public Land Order 82, and Public Land

Order 2215. It is the intent of the amendment that the decision of the Congress that land within the NPR-A be considered "vacant, unappropriated and unreserved" within the meaning of the act of May 17, 1906, is determinative of the land status issue, and, consequently, such issue is outside the purview of any adjudicative proceeding conducted pursuant to subsection (5) of section 905.

126 Cong. Rec. 33472 (emphasis supplied).

I agree with appellants that reading section 905(a) in light of the comments made by Representative Udall leads necessarily to the conclusion that, for purposes of present adjudication, the status of lands within the NPR-A is not to be deemed a bar to approval of an allotment either legislatively or under the 1906 Native Allotment Act. Thus, if a state or private party had filed an objection under section 905(a)(5), thereby requiring adjudication under the 1906 Act, the fact that Native occupancy had commenced after 1923 would not defeat the allotment application.

The instant case, however, presents a different problem. As I read section 905(a)(1), Congress did not purport to say that land within the NPR-A was never withdrawn. Rather, Congress was attempting to remove any withdrawal of such land as a present obstacle to the grant of a Native allotment. In the instant case, title to the land at issue vested in the Ukpeagvik Inupiat Corporation on November 19, 1976. Thus, in order to support a suit to divest the Corporation of the land conveyed, it would be necessary to show that, at the time the land was conveyed, the land was properly subject to an allotment claim. This appellants cannot do.

As the majority points out, at the time that the land was conveyed to the Native Corporation, all of the Native allotment applications involved in this appeal had been finally rejected by the Department. There was no appeal then pending in Federal court challenging the Department's disposition of these applications. ^{1/} There was, therefore, no procedural error in issuance of the conveyance such as has, in the past, served as a basis for a suit to annul a patent. See, e.g., Germania Iron Co. v. United States, 165 U.S. 379 (1897); Southern Pacific R. Co. v. United States, 51 F.2d 873 (9th Cir. 1931); Sage v. United States, 140 F. 65 (8th Cir. 1905). Nor can appellants show that there was a substantive error in issuance of the conveyance.

Thus, three of the allotment applicants had commenced their use after the establishment of Naval Petroleum Reserve No. 4. The other, Mollie Itta, was only 14 months old at the time of the withdrawal. The majority correctly points out that, as a matter of law, the Board has held that 14 months is too

^{1/} While it is true that a challenge involving all Native allotment applicants whose allotments had been rejected because of the withdrawals establishing Naval Petroleum Reserve No. 4 was ultimately pursued, this occurred almost 2 years after the subject lands were conveyed. See Leavitt v. United States, No. A78-287 Civ. (filed October 26, 1978).

tender an age to support an assertion of independent use of a parcel of land potentially exclusive of others.

It may be that the status of the land in Naval Petroleum Reserve No. 4 would not now serve as a bar to approval of appellants allotment applications. However, in order for appellants (and ultimately the Department in a suit for judicial review) to succeed in establishing that the land was improperly conveyed to the Ukpeagvik Inupiat Corporation, they must show that the conveyance was wrong at the time that it was made. But, in order to establish this, appellants would have to establish that Naval Petroleum Reserve No. 4 never withdrew the land from Native allotment. This, however, is the precise issue which served as a basis for the initial rejection of three of these allotments. See Silas Negovanna, 15 IBLA 408 (1974). I think that there is no question that, but for ANILCA, the same result would obtain at the present time. In my view, just as ANILCA could not retroactively approve allotments on land already conveyed out of Federal ownership, it was also powerless to retroactively change the status of the land so conveyed when to do so would adversely affect a third party (in this case, the Ukpeagvik Inupiat Corporation). Thus, I agree with the majority that the instant appeals must be rejected.

James L. Burski
Administrative Judge